

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:

MR. JUSTICE MUSHIR ALAM
MR. JUSTICE QAZI FAEZ ISA
MR. JUSTICE SARDAR TARIQ MASOOD

**Civil Appeal No. 767 of 2014 and
C. M. A. No. 565-K/2013**

(On appeal against the judgment dated
10.07.2013 passed by the High Court of
Sindh, Karachi, in C.P.No. D-2643/2012)

Sindh Revenue Board through its Chairman,
Government of Sindh and another.....Appellants

Versus

The Civil Aviation Authority of Pakistan
through its Airport Manager, Jinnah
International Airport, Karachi.....Respondent

For Appellant No. 1: Mr. Farooq H. Naek, Senior ASC

For Appellant No. 2: Mr. Khalid Javed Khan, ASC
Mr. Fouzi Zafar, ASC
Raja Abdul Ghafoor, AOR

For the Respondents: Syed Naveed Amjad Andrabi, ASC

On behalf of Federation: Mr. Muhammad Waqar Rana,
Additional Attorney General

On behalf of Govt. of Sindh: Mr. Sabtain Mehmood,
Additional Advocate General

Dates of Hearing: April 6, 12 and 13, 2017

JUDGMENT

Qazi Faez Isa, J: The High Court of Sindh at Karachi allowed a petition filed by the Civil Aviation Authority ("**CAA**") under Article 199 of the Constitution of the Islamic Republic of Pakistan ("**the Constitution**"). The CAA, which was established under the Pakistan Civil Aviation Authority Ordinance, 1982 ("**the CAA Ordinance**"), had filed the said petition challenging the imposition of sales tax on services levied upon it under the Sindh Sales Tax on

Services Act, 2011 (hereinafter "**the Act**") and the Sindh Sales Tax on Services Rules, 2011 (hereinafter "**the Rules**").

2. The learned Division Bench of the High Court allowed the petition filed by CAA and declared that CAA was, "*not liable to pay the tax under the Sindh Sales Tax on Services Act, 2011*", consequently, all demands made, proceedings initiated, orders passed or notices issued to CAA under the Act and the Rules were quashed and set aside. Since this case required the interpretation of the Constitution notices under Order XXVII-A of the Code of Civil Procedure were issued to the Attorney General for Pakistan and the Advocate General of Sindh.

3. The learned senior counsel Mr. Farooq H. Naek represents Sindh Revenue Board ("**the Board**") constituted under section 3 of the Sindh Revenue Board Act, 2011. The learned Mr. Khalid Javed Khan represents the Government of Sindh, and the learned Additional Advocate General, Sindh Mr. Sabtain Mehmood, represents the Advocate General of his province. We were informed that the learned counsel were granted requisite permission to represent the Government of Sindh; the complicated and technical nature of the dispute involving the interpretation of the Constitution would justify such engagement.

4. The learned Mr. Farooq Naek took us through the various provisions of the Act, the Rules, the CAA Ordinance and the Constitution. He stated that only the Federal Government is exempt from taxation under Article 165(1) of the Constitution and this exemption would not extend to CAA as it is a statutory body

set up under the CAA Ordinance. By referring to item 49 of Part I of the Federal Legislative List (the Fourth Schedule to the Constitution) he stated the Eighteenth Amendment to the Constitution (Act X of 2010) amended the said item 49 by inserting therein the words, "*except sales tax on services*" thereby meaning that the Federal Legislature does not have the power to impose sales tax on services and the power to impose sales tax on services exclusively vests in the provinces. He next referred to section 8 of the President's Order No. 5 of 2010 (published in the Gazette of Pakistan on May 10, 2010) which stipulates that, "*sales tax on services is a provincial subject under the Constitution ... and may be collected by respective provinces*". Through the said Presidential Order the recommendations of the National Finance Commission were implemented. The provinces, according to the learned counsel, have always had the legislative power to tax *services* and the imposition of the sales tax on the services provided by CAA accords with the Constitution, the Act and the Rules; and cannot be circumvented by misplaced reliance on Article 165(1) of the Constitution. After referring to the CAA Ordinance the learned senior counsel stated that from these provisions it is clear that the CAA is not the Federal Government nor can it be equated with it, therefore CAA cannot avail of the exemption provided to the Federal Government in Article 165(1) of the Constitution. It was alternatively canvassed by Mr. Naek that with regard to the regulatory functions of CAA in connection with air-navigation no sales tax is imposed and it is only on the commercial activities undertaken and billed by CAA on which sales tax is imposed. The learned senior counsel alternatively averred that, neither on the property nor on the income of CAA sales tax has been imposed

therefore on this ground too Article 165(1), which only exempts property and income, is not applicable. Mr. Naek took us through the provisions of the Act and the Rules where under sales tax on the services provided by CAA is levied and the mode and manner of calculation and payment thereof. Reliance was placed by the learned counsel on the following judgments of this Court: Central Board of Revenue v SITE (PLD 1985 Supreme Court 97), Rice Export Corporation of Pakistan Ltd. v KMC (PLD 1990 Karachi 186), Province of NWFP v Pakistan Telecommunication Corporation (PLD 2005 Supreme Court 670), Central Board of Revenue v WAPDA (PLD 2014 Supreme Court 766), XEN Shahpur Division v Collector Sales Tax (Appeals) (2016 SCMR 1030), Province of Punjab v Muhammad Tufail & Co. (PLD 2017 Supreme Court 53), International Airport Authority of India v Municipal Corporation of Delhi (AIR 1991 Delhi 302) and All India Federation of Tax Practitioners v Union of India (AIR 2007 Supreme Court 2990).

5. The learned Mr. Khalid Javed Khan commenced his arguments by referring to the Government of India Act, 1935 whereby sales tax on services was first imposed. He, however, clarified that in India it was the Union which was empowered to impose tax on services and the Indian States could impose tax on goods, however, later the Union of India was empowered to charge tax both on services as well as on goods. The learned counsel stated that in Pakistan the power to impose sales tax on services was neither mentioned in the Federal Legislative List nor in the Concurrent Legislative List, therefore, it was a residual power which vested in the provinces even before the removal of the Concurrent Legislative List from the Constitution, which was done

pursuant to the Eighteenth Amendment and the words - *except sales tax on services* – were inserted in item 49 of Part I of the Federal Legislative List which endorsed that the constitutional power to impose sales tax on services lay with the provinces. The learned counsel also referred to the different provisions of the Act and the Rules. Whilst referring to the CAA Ordinance the learned counsel stated that CAA performs some sovereign functions similar to those undertaken by a government or a state, however, it also carries out commercial activities and it is only on the provision of such commercial services, which the Constitution does not exempt, that sales tax has been levied on CAA. He stated that the learned Judges of the High Court were not justified to broaden the definition of the Federal Government by including CAA within its scope, and to then extend the exemption, which was only available to the Federal Government under Article 165(1) of the Constitution, to CAA as well. A statutory body like the CAA cannot be equated with the Federal Government because Article 165A of the Constitution specifically refers to such bodies, whereas Article 165 does not do so, therefore, if the Constitution wanted to grant exemption to statutory bodies like the CAA it could have mentioned such bodies too in Article 165(1). Mr. Khan stated that Article 165(1) and 165A(1) are mutually exclusive and Article 165A was inserted into the Constitution by the Constitution (Amendment) Order, 1985 in order to undo the effect of the judgment in the case of Central Board of Revenue v SITE (above). Reference was also made by the learned counsel to the following cases: KDA v Central Board of Revenue (2005 PTD 2131, “**the KDA case**”), Province of NWFP v Pakistan Telecommunication Corporation (above, “**the PTC case**”), Central Board of Revenue v WAPDA (PLD 2014

Supreme Court 766 (**"the CBR-WAPDA case"**). Mr. Khan stated that the judgments of this Court in the KDA and PTC cases were difficult to reconcile, however, the subsequent judgment in the CBR-WAPDA case of a five Member Bench of this Court had resolved the contradiction by distinguishing between commercial and non-commercial activities. He stated that the judgment in the CBR-WAPDA case was equally applicable to CAA since, like WAPDA, it too is not the Federal Government. The decision in the CBR-WAPDA case however came after the impugned judgment and its *ratio decidendi* has effectively overruled the *ratio decidendi* of the impugned judgment. The learned counsel also referred to sub-sections (1) and (2) of section 49 of the Income Tax Ordinance, 2001, which exempt the income of the Federal Government and of the provincial governments respectively from income tax, except the income of a provincial government derived from business carried outside its territory, and the exemptions in the Income Tax Ordinance reflect the exemptions contained in Article 165; the learned counsel pointed out that sub-section (4) of section 49 is in similar terms to Article 165A(1).

6. Representing the Attorney General Mr. Muhammad Waqar Rana, the learned Additional Attorney General ("**AAG**") stated that:

(1) Article 165(1) uses the word "taxation" which is defined in Article 260 of the Constitution and, "*includes the imposition of any tax or duty, whether general, local or special, and 'tax' shall be construed accordingly*", therefore, the word taxation covers every conceivable kind of tax, including sales tax on services.

(2) If Articles 142(a), 151(1), 151(2), 97 and 98 and item 22 of Part I of the Federal Legislative List are read together it is apparent that a province cannot impose sales tax on CAA.

(3) In item 1 of Schedule II of the Rules of Business, 1973, which are enacted pursuant to Article 99 of the Constitution, the "Aviation Division" of the Federal Government is mentioned where under is listed the business of the Aviation Division which includes the functions performed by CAA.

(4) The Federal Government funds CAA as is also demonstrated by the latest Federal budget.

(5) There are a number of provisions of the CAA Ordinance which grant the Federal Government complete financial control over CAA, and particularly: section 15 which deals with its budget, section 16 which deals with its funds, section 17 which stipulates the manner in which its accounts have to be maintained, section 18 which stipulates the requirement of audit by the Auditor General and section 20 which refers to the liability of the Federal Government.

(6) Parliament has enabled CAA to levy and collect different charges and fees (section 16 of the CAA Ordinance) which is a power of the Federal Government under Articles 7 and 77 of the Constitution, which further establish the status of CAA, which is akin to that of the Federal Government.

(7) International obligations and commitments pertaining to aviation are to be undertaken by the Federal Government and the CAA is the vehicle employed by the Federal Government through which its commitments are met and performed.

(8) The ownership of aerodromes, airports and other properties of the Aviation Division of the Federal Government were not

transferred to CAA pursuant to the CAA Ordinance. The *ownership* of property as opposed to merely holding property are altogether different as was held in the case of Pakistan v Province of Punjab (PLD 1975 Supreme Court 37), in which case the province could impose property tax because all the lands situated within the limits of the cantonment areas were acquired or provided or maintained by the Cantonment Board and "shall vest in and belong to that Board" and were under its direction, management and control. Reference was also made to the case of the Board of Foreign Missions v Government of Punjab (1987 SCMR 1197) where it was held that, "the word 'vest' is a word of variable import, not having a fixed connotation and does not necessarily mean 'vest in title' " (page 1202A).

(9) The Act and the Rules encroach upon the legislative domain of the Federal Legislature and conflict with the CAA Ordinance therefore the Act and the Rules are to such extent void as stipulated by Article 143 of the Constitution.

(10) The judicially determined test of what constitutes the Federal Government is the "function and control test"; the functions performed by the CAA, including those mentioned in item 22 of Part I of the Federal Legislative List, are those of the Federal Government and the Federal Government completely controls CAA through its Board which is appointed by the Federal Government, therefore, for purpose of Article 98 CAA is the Federal Government.

(11) The preamble and section 5 of the CAA Ordinance sets out the functions of CAA. These functions cannot be categorized as taxable services and then made liable to the payment of sales tax. In this regard reliance was placed upon the cases of Zila Council v Daewoo Corporation (2001 SCMR 1021) and Province of NWFP v

Pakistan Telecommunication Corporation (PLD 2005 Supreme Court 670 at pages 681 to 684).

(12) The judgment in the SITE case (above) was undone by Article 165A of the Constitution and the judgment in the KDA case (above) is distinguishable since the matter involved imposition of sales tax on the pipes manufactured by KDA, as the manufacture of pipes was “not wholly for the discharge of sovereign functions” (paragraph 6, page 2134). The judgment in the PTC case (above) was applicable because CAA was also performing sovereign functions. Reference was also made to the cases of WAPDA v Administrator, District Council (2005 SCMR 487), Godfrey Phillips India Ltd. v State of U.P. (AIR 2005 Supreme Court 1103), New Delhi Municipal Committee v State of Punjab (AIR 1997 Supreme Court 2847), South Australia v The Commonwealth (174 C.L.R. [Commonwealth Law Reports] 235) and Attorney General of British Columbia v Attorney-General of Canada (1924 (AC) 203).

7. CAA was represented by the learned Mr. Naveed Amjad Andrabi who adopted the arguments of the learned AAG. He stated that even the CBR-WAPDA case holds that in some circumstances the corporate veil can be lifted and the present case is one where it should be, and once this is done it would reveal that CAA is performing the functions of the Federal Government. Reference was also made to the “doctrine of instrumentalities” to show that CAA was the “alter ego” of the Federal Government and performs functions of the Federal Government, is financially dependant on the Federal Government and is empowered to levy charges and fees, which is one of the powers vesting in the Federal Government, therefore, in effect the CAA is the Federal Government in terms of

Article 165(1) of the Constitution and consequently it too enjoys exemption from tax thereunder.

8. Messrs Farooq H. Naek and Khalid Javed Khan availed their right to rebut the contentions of the learned AAG and those of the learned counsel for the respondent. Mr. Naek stated that the reference to the CAA Ordinance and Rules of Business, 1973 is inconsequential. Moreover, WAPDA too is mentioned in the Rules of Business (item 38 of Schedule II) and in the CBR-WAPDA case (above) this Court held, that WAPDA was not the Federal Government (paragraphs 13, 15 and 21 of the judgment). Reference was also made to the proviso to Article 97 of the Constitution to state that the authority of the Federal Government does not extend to those matters which are placed by the Constitution within the domain of the provincial legislatures, and imposition of sales tax on services was one such matter. Referring to the Federal Legislative List he stated that item 22 of Part I cannot be read in a manner which has the effect to negate the specific exception incorporated through the amendment made in item 49, which emphatically stated that sales tax cannot be imposed by the Federal Legislature, since the amended item 49 mentions, "*except sales tax on services*". The learned counsel further stated that there is no reason to include statutory bodies like CAA in the "Federal Government" mentioned in Article 165(1) and to then extend the exemption contained therein to sales tax on services as well. The additional precedents cited by the learned counsel were: Reference by the President (PLD 1957 Supreme Court 231), Kerala Colour Lab Assn. v Union of India (Ker.) (2003

(156) ELT 17 Kerala) and Smith, Stone & Knight v. B'ham Corpn. (1993 AER 116).

9. The learned Mr. Khalid Javed Khan stated that CAA was a statutory body established under the CAA Ordinance and was no different from other statutory bodies exempted in Article 165A(1) of the Constitution. Therefore, CAA cannot be both a statutory body under Article 165A(1) and also the "Federal Government" under Article 165(1) of the Constitution. He next stated that sales tax is imposed only on the services provided by CAA and not on the income or the property of CAA. He concluded by referring to the judgment in the case of Mustafa Impex v Government of Pakistan (PLD 2016 Supreme Court 808) and that paragraphs 27, 32 and 35 of this judgment make it abundantly clear that CAA cannot be categorized as the Federal Government.

10. We have heard the learned counsel at length and with their able assistance examined the record of the case, the applicable laws, the Constitution and the precedents. The High Court allowed the petition filed by CAA by drawing an analogy with the PTC case; CAA is structurally similar to what used to be the Pakistan Telecommunication Corporation ("**PTC**") and PTC performed the functions of a Federal Government Department therefore CAA which also performs functions of the Federal Government and which were previously performed by the Civil Aviation ("**CA**") Department of the Federal Government, therefore, CAA like PTC was also exempt:

"The petitioner and PTC are both statutory entities set up by federal law. Learned counsel for the SRB [Sindh Revenue Board] very fairly (and in our view quite

correctly) accepted that there were many striking parallels between the two entities. When the *PTC* case is read as a whole, in our respectful view it is clear that the Supreme Court attached great importance to the manner in which PTC was set up and structured and in particular the fact that it succeeded to the Federal Government itself (in respect of the T&T Department). Of course, as already noted, the CAA also took over the functions of the CA Department, which was part of the Ministry of Defence." (Reproduced from paragraph 21)

The learned judges of the High Court then held that if a "broad meaning" is given to the word "income" it would include *sales tax* and CAA like the Federal Government would also have "immunity" from taxation under Article 165(1) of the Constitution:

"The terms "income" and "property" as used in relation to taxation in Article 165 are to be given a broad meaning. These terms are not confined to what we have described as the narrow or strict meaning. The intergovernmental immunity granted by Article 165 has been lifted in relation to provincial entities in respect of the income-tax by Article 165A, as expressly provided therein, and by extension thereof in the *KDA* case in relation to the federal sales tax. However, the exclusionary effect of the *KDA* case goes no further and in particular, it does not apply to the intergovernmental immunity available to federal entities in relation to provincial taxation in respect of income or property. The provincial sales tax levied by and under the Sindh Act comes within the broad meaning to be given to 'income' in Article 165. Since there is, as presently relevant, no material difference between the position of PTC and the CAA, the intergovernmental immunity from the provincial sales tax is available to the latter just as immunity from octroi was available to the former. In other words, in

our respectful view, the controlling Supreme Court authority in the present facts and circumstances is the *PTC* case insofar as it relates to and decides the *PTC* appeal, and no (with the utmost respect) the *KDA* case." (Reproduced from paragraph 23)

11. The learned counsel with some justification stated that the High Court's judgment was built up by drawing an analogy with the PTC case however the *ratio decidendi* of the PTC case was undone by the latter five Member Bench judgment of this Court in the CBR-WAPDA case (above), which decided that WAPDA was not exempt from tax under Article 165(1) of the Constitution. However, in the cited case central excise duty (which was challenged) was imposed on "*services provided or rendered by banking companies... dealing in advancing of loans, in respect of advances made to any persons*" and this had been imposed through legislation enacted by the Federal Legislature. The constitutional powers of the provinces vis-à-vis the Federation was not at issue in the case. Moreover, and significantly, the Federal Government itself had stated that WAPDA did not come within the definition of the Federal Government nor performed the functions of the Federal Government. This Court after determining the nature of WAPDA (in paragraph 12, pages 773-4) concluded that WAPDA "*has been given a freehand*" to run its business (paragraph 13, page 774). It was further held that WAPDA's corporate veil cannot be lifted. Resultantly, it was decided that WAPDA could not be equated with the Federal Government and therefore could not claim exemption from taxation under Article 165(1) of the Constitution. We need not however spend more time on this case as we are primarily

concerned with whether the provincial legislature has the power to tax a federal body like CAA.

12. The impugned judgment assumes that the Sindh Legislature was constitutionally competent to impose sales tax on services provided by CAA. Proceeding on this assumption CAA was held not to be liable to pay sales tax because it performs functions of the Federal Government and therefore had *immunity* from taxation, including that of sales tax. The High Court did not consider whether, in the first place, the provincial legislature was constitutionally empowered to impose sales tax on CAA, and then, whether CAA was providing *services* on which sales tax could be levied. CAA had in its petition also challenged the “power to impose a tax” by the Sindh Legislature (paragraph 12 of the petition). Therefore, before considering the question of “exemption” under Article 165(1) of the Constitution the following primary questions need to be attended to:

- i. Did the Sindh Legislature have the power under the Constitution to impose sales tax on CAA?
- ii. And if it did, was CAA providing *services* on which sales tax could be imposed?

13. Before considering the aforesaid questions the general provisions of the Act and the Rules which impose sales tax and the specific provisions which impose it on CAA need to be set out. The Act enables the imposition of sales tax on a *taxable service* and its section 3 defines a *taxable service* to be a service listed in the Second Schedule of the Act; the two relevant entries under the

“Second Schedule” pertaining to “Taxable Services” are tariff heading 9819.9090 and 9826.0000, reproduced hereunder:

<u>Tariff Heading</u>	<u>Description</u>	<u>Rate of tax</u>
9819.9090	Services provided or rendered by port operators, airport operators, airport ground service providers and terminal operators.	13%
9826.0000	Airport services	13%

The terms used in the aforesaid two tariff headings have been defined in sub-sections (5), (6), (7) and (79) of Section 2 of the Act, which are respectively reproduced hereunder:

“(5) **“airport ground service provider” and “airport service provider”** mean and include any service provider, operator and airline providing or rendering ground or ramp services, including passenger and cargo handling services, to other airlines or to aircraft operators of scheduled or non-scheduled flights, and also include the handling agents authorized by the Civil Aviation Authority or other airport operators;

(6) **“aircraft operator”** means and includes any person who provides the services of transportation or carriage of passengers, goods, cargo, baggage or mail by aircraft;

(7) **“airport operator”** means and includes the Civil Aviation Authority and any other authority or organization or office managing or operating a customs airport, as notified under section 9 of the Customs Act, 1969 (Act No. IV of 1969);

(79) **“service” or “services”** means anything which is not goods and shall include but not limited to the services listed in the First Schedule of this Act.

Explanation-I: A service shall remain and continue to be treated as service regardless whether or not the providing thereof involves any use, supply, disposition or consumption of any goods either as an essential or as an incidental aspect of such providing of service;

Explanation-II: Unless otherwise specified by the Board, the service or services involved in the supply of goods shall remain and continue to be treated as service or services;”

14. Rule 40-A of the Rules stipulates that all charges on account of *services* which are provided by airport operators and airport terminal operators are liable to sales tax:

"40A. Services provided by Airports Operators and Airport Terminal Operators.-

(1) All charges on account of the following services provided or rendered by an airport operator and an airport terminal operator shall be leviable to sales tax:

- (i) Landing, housing, hangarage and parking;
- (ii) Aerobridge facility;
- (iii) Aircraft power supply;
- (iv) Ground handling;
- (v) Commercial licenses in respect of various services provided or rendered at an airport;
- (vi) Royalties including those on meal uplift; and
- (vii) Cargo throughput and the cargo and baggage storage services:

Provided that the charges on account of aforesaid services shall not be subjected to sales tax in case of the services provided or rendered to the aircrafts of the armed forces using an airport belonging to or operated by the armed forces of Pakistan.

(2) The value of taxable services for the purpose of levy of sales tax shall be the gross amount charged for the services.

(3) The amount of sales tax involved shall be deposited in the prescribed manner by the 15th day of the following second month and the prescribed tax return shall be filed within three days from the due date prescribed for payment of tax.

(4) The airport operator and the airport terminal operator shall maintain such record as are prescribed under section 26 of the Act and sub-rule (2A) of rule 29 of these rules in such manner as will enable distinct ascertainment of payment of the tax due."

Rule 40-B of the Rules stipulates that all charges on account of *services* provided by airport ground service providers and airport service providers are liable to sales tax:

"40B. Services provided by airport ground service providers and airport service providers.-

(1) All charges on account of the following services provided or rendered to airlines by airport ground service providers and other airport services providers at an airport shall be leviable to sales tax:

- (i) aircraft handling;
- (ii) passenger and baggage handling;
- (iii) cargo and mail handling;
- (iv) cabin services and maintenance;
- (v) ramp handling; and
- (vi) services like Airport Connect Open.

(2) The value of taxable services for the purpose of levy of sales tax shall be the gross amount charged for the services.

(3) The amount of sales tax involved shall be deposited in the prescribed manner by the 15th day of the following month and the prescribed tax return shall be filed within three days from the due date prescribed for payment of tax.

(4) The airport ground service providers and other airport service providers shall maintain such record as are prescribed under section 26 of the Act and sub-rule (2A) of rule 29 of these rules in such manner as will enable distinct ascertainment of payment of the tax due."

15. It will also be appropriate to examine the nature of CAA and the relevant features of the law establishing it. The CAA Ordinance was promulgated on December 2, 1982 (published in the Gazette of Pakistan on December 4, 1982) "*...to establish a Civil Aviation Authority to provide for the promotion and regulation of civil aviation activities and to develop an infrastructure for safe, efficient, adequate, economical and properly coordinated civil air transport service in Pakistan*" (preamble to the CAA Ordinance). Section 3 of the CAA Ordinance provides that, "*...the Federal Government shall, by notification in the official Gazette, establish an authority to be known as the Civil Aviation Authority for carrying out the purposes of this Ordinance.*" Consequently, a notification was issued on December 6, 1982 establishing CAA on December 7, 1982. The

powers and functions of CAA are listed in section 5 of the CAA Ordinance, which provide that CAA *"shall be responsible for the regulation and control of civil aviation activities in the country"* (sub-section (1) of section 5 of the CAA Ordinance), shall develop infrastructure *"for the promotion of safe, efficient, adequate, economical and properly coordinated civil air transport service and control and regulate civil aviation activities in Pakistan"* (sub-section (2) of section 5 of the CAA Ordinance), shall provide civil airports and aerodromes, air traffic and navigational services to aircraft, communication services at airports and aerodromes, aeronautical and flight inspection services, search and rescue services, crash, fire and rescue services, management of estates at airports and aerodromes and *"any other matter facilitating the achievement of the objects of this Ordinance"* (sub-section (3) of section 5 of the CAA Ordinance).

16. Some of the functions that CAA is required to perform are those that are specifically mentioned in the Constitution and in respect whereof only the Federal Legislature can enact laws. Item 22 of Part I of the Federal Legislative List mentions *"Aircraft and navigation; the provision or aerodromes; regulation and organization of air traffic and of aerodromes"*. Some of the other functions that CAA performs are covered by the following items of Part I of the Federal Legislative List:

- Item 24 - *"Carriage of passengers and goods... by air"*
- Item 27 - *"...inter-provincial trade and commerce..."*
- Item 32 - *"international treaties, conventions and agreements..."*
- Item 53 - *"Terminal taxes on... passengers carried by... air; taxes on their fares and freights"*

- Item 54 - "Fees in respect of any of the matters in this Part...".

If any of the functions which CAA performs under the CAA Ordinance are deemed not to be covered by any of the foregoing items then these are covered by item 59 of Part I of the Federal Legislative List, which encompasses, "*Matters incidental or ancillary to any matter enumerated in this Part.*" It is therefore quite clear that the functions performed by CAA are those which are listed in the Federal Legislative List. The CAA Ordinance, which has constitutional cover, requires CAA to establish and maintain airports and to make certain that the requisite facilities and paraphernalia is also available at these airports. These facilities and paraphernalia are categorized as *services* in the Act and the Rules, and sales tax is imposed on them. We cannot accept that the legislative duties and functions of CAA are *services*. To state what is obvious, CAA has no option but to undertake its statutory duties and responsibilities. Merely because CAA imposes a fee or charge for providing them, which Parliament has authorized it to impose, will not in itself bring the provision of these duties and functions and the facilities and paraphernalia provided pursuant thereto within the realm of *services* upon which sales tax can be levied.

17. Are the Sindh Legislature, which had enacted the Act, and the Government of Sindh, which had made the Rules, constitutionally empowered to impose sales tax on CAA? If, for the sake of argument, it be accepted that the provincial legislature could impose sales tax on the purported *services* provided by the CAA then it could also do so in respect of other subjects listed in

the Federal Legislative List. Sales tax could be imposed on all those using the *services of "national highways and strategic roads"* (item 34 of Part II of the Federal Legislative List) constructed by the Federation or by an authority under its control, such as the National Highways Authority. Similarly, sales tax on the provision of *services of "Railways"* (item 1 of Part II of the Federal Legislative List) could be imposed on passengers traveling in the province. Likewise *post, telegraphs and telephones* calls (item 7 of the Part I of the Federal Legislative List) received in the territory of a province too could be taxed. Those provided with new passports (item 4 of Part I of the Federal Legislative List) who now are able to avail the *services* of international travel could be subjected to sales tax when new passports are issued to them and also when they use their passports at the port of embarkation or disembarkation situated within the territory of the taxing province. In doing so the provinces would be taxing the subjects which are on the Federal Legislative List. The Constitution does not permit this overreach. Article 142(a) of the Constitution states that Parliament (the Federal Legislature) "shall have exclusive power to make laws with respect to any matter in the Federal Legislative List". The Federal Legislative List, after listing the specific subjects in respect whereof the Federal Legislature alone can legislate, concludes with the words "*matters incidental or ancillary to any matter enumerated in this part*". It would therefore be appropriate to consider the scope of this *incidental or ancillary* provision.

18. The Constitution of both Pakistan and India are modeled on the Constitution of the United States of America ("**the US Constitution**"). The US Constitution bifurcates the legislative

domain of Congress (like our Parliament) and of the legislatures of the States (like our provincial legislatures). The American courts have had to determine in which competing legislative domain the right to legislate subsists. The Tenth Amendment to the US Constitution amended the US Constitution by stating that the powers not delegated to the United States (the Federation) are reserved for the States, which provision is similar to the scheme of our Constitution. However, the US Congress often uses the provision granting it the power "*To regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes*" also referred to as the "**Commerce Clause**" (clause 3, of section 8 of Article I of the US Constitution) to make laws in respect of subjects which appear not to be with Congress.

19. In the 1941 case of United States v Darby Lumber Co. (312 US 100) the Fair Labor Standards Act of 1938, which had established a minimum wage and maximum hours for employees engaged in the production of goods for interstate commerce and imposed criminal penalties for violations of the Act, was assailed. Darby, a lumber manufacturer, was arrested for violating the Act in respect of some goods shipped interstate. The District Court held that since the Act sought to regulate the manufacturing activity within a State it was unconstitutional because Congress did not have the constitutional authority to regulate the manufacture of goods within a State. The US Supreme Court however held that even though *manufacture* was not interstate commerce Congress still had the power to establish and enforce labor standards for the manufacture of goods crossing state lines; and to use the Commerce Clause to facilitate fair competition by

excluding the distribution of goods produced under substandard labor conditions. Thus exercise of power over interstate activities was legitimately used by Congress to regulate interstate commerce. The Tenth Amendment to the US Constitution (which had the same effect as the removal of the Concurrent Legislative List from our Constitution) provided that, "*The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people*", was held not to be a limitation upon the authority of Congress which could resort to all means for the exercise of a granted power. Justice Harlan Fiske Stone wrote:

"Such legislation has often been sustained with respect to powers... when the means chosen, although not themselves within the granted powers, were nevertheless deemed appropriate aids to the accomplishment of some purpose within an admitted power of the national government... ."

20. In the Darby Lumber case (above) the US Supreme Court overruled its own earlier majority view in the case of Hammer v Dagenhart (247 US 251) and instead opted for the then minority view of Justice Oliver Wendell Holmes, who had held that:

"The act [Keating Owen Act of 1916, which prohibited interstate commerce of any thing manufactured made by children under the age of fourteen] does not meddle with anything belonging to the States. They may regulate their internal affairs and their domestic commerce as they like. But when they seek to send their products across the state line, they are no longer within their rights."

Merely because manufactured goods had crossed the State line denuded the State's legislature of power, which it otherwise clearly possessed, and empowered Congress to enact a law to determine how goods are to be manufactured, a power which the Congress did not otherwise have. Article 151(1) of our Constitution

also enables "free" inter-provincial "trade, commerce and intercourse". And, Article 151(2) states that only the Federal Legislature may impose restriction on such trade, commerce and intercourse and that too "as may be required in the public interest".

21. In the 1819 US Supreme Court case of M'Culloch v Maryland (17 US 316), the question arose, whether the law by which the US National Bank was created and its branches established was within the legislative competence of Congress. Reference was made to the last clause in section 8 of Article I of the US Constitution, which granted to Congress the power, "*To make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the government of United States... .*" Chief Justice John Marshall in his classic judgment held, that though the specific power to create the bank and its branches was not specifically granted to Congress it was, "a right incidental to the power [of carrying into execution the sovereign powers], and conducive to its beneficial exercise".

"We do not find the word 'bank', or 'incorporation', we find the great powers to lay and collect taxes; to borrow money; to regulate commerce... . But it may with great reason be contended, that a government, entrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be entrusted with ample means for their execution. ...The government, which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means;... No sufficient reason is, therefore, perceived, why it may not pass as incidental to those powers which are expressly given, if it be a direct mode of executing them."

"The sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

22. We have been called upon to determine the constitutional competence of a provincial legislature to tax the *services* provided by CAA. The *services* which are taxed enable and facilitate aircrafts taking off, landing in and/or flying over a province's territory and provide facilities for these aircrafts and the passengers and goods carried by them. In the case of Pakistan Tobacco Company Ltd. v. The Government of N.W.F.P. (PLD 2002 Supreme Court 460) this Court reiterated that in interpreting the Constitution the approach of the court should be dynamic, progressive and liberal. In the more recent case of Lahore Polypropylene Industries (Pvt.) Ltd. v Federation of Pakistan (2012 SCMR 709, at paragraph 11 page 718) this Court held, that the entries in the Federal Legislative List must not be given a "narrow and pedantic interpretation". We have examined the relevant Constitutional provisions and interpreted them in the light of the said principles. The appellants state that the insertion made in item 49 by the Eighteenth Amendment removed *sales tax on services* from the domain of the Federal Legislature and the power to impose sales tax on services exclusively came to vest in the provinces; a similar argument was put forward in the Darby Lumber case (above) where it was stated that the Tenth Amendment to the US Constitution had made it clear that all residual powers vests in the States. However, the US

Supreme Court did not accept that the States either had or pursuant to the Tenth Amendment had assumed absolute power to legislate on the subject. The US Supreme Court held that even though some powers were not, "*within the granted powers [to Congress], were nevertheless deemed appropriate aids to the accomplishment of some purpose within an admitted power*". In other words the US Supreme Court effectively gave the US Congress the power to legislate in respect of a whole swathe of subjects on the basis that these were "necessary and proper" to enable Congress to make laws.

23. Item 59 of Part I and item 18 of Part II of the Federal Legislative List of our Constitution provide that the "*matters incidental or ancillary to any matter enumerated in the Federal Legislative List*" are also within the exclusive domain of the Federal Legislature. These provisions are similar to the American "*necessary and proper*" powers. Chief Justice Muhammad Haleem, writing for the Supreme Court, in the case of Abdur Rahim v Federation of Pakistan (PLD 1988 Supreme Court 670, at page 676) opined that the words *incidental or ancillary* should not be construed narrowly and they don't necessarily mean lesser things:

"Although the words 'incidental' and 'ancillary' literally mean things of lesser or subordinate degree or of consequential nature but in the legislative interpretation they mean more than this. While interpreting the words 'incidental' and 'ancillary' in Messrs Haider Automobile Ltd. v. Pakistan (PLD 1969 SC 623), it was observed:

"The items in the legislative list, as was observed in the case of United Provinces v. Atiq Begum and others are not to be read in any narrow or pedantic sense. Each general word therein should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended within it.

These items describe only comprehensive categories of legislation by a word of broad and general meaning."

Justice Fazal Karim in his definitive two volume book "Judicial Review of Public Actions" (published by Universal Law Publishing Co. 2006, at page 1225 of volume 2) writes:

"In sum, the doctrine of 'incidental or ancillary' powers is like the American 'necessary and proper' doctrine a doctrine of implied power and as James Madison put it:

"Had the Constitution been silent on this head, there can be no doubt that all the particular powers requisite as means of executing the general powers would have resulted to the government by unavoidable implication. No axiom is more clearly established in law, or in reason, than that whenever the end is required, the means are authorized; whenever a general power to do a thing is given, every particular power necessary for doing it is included."

24. In addition to performing functions which are mentioned in the aforesaid items in Part I of the Federal Legislative List, CAA is also a regulatory authority (item 6 of Part II of the Federal Legislative List) and regulates aircrafts and air traffic control. The province of Sindh wants to tax CAA undoubtedly to capture a portion of CAA's revenue. The province's case is that it always had the power to do so. It further contends that by inserting the words – "*except sales tax on services*" (in item 49 of Part I of the Federal Legislative List) there remains no doubt that the power to impose sales tax on services now exclusively vests in the provincial legislatures. Before the words – "*except sales tax on services*" – were inserted in item 49 neither a province nor the Federation had imposed sales tax on the *services* provided by CAA. Can it therefore now be assumed that the provinces have the power to tax federal

bodies or institutions, and particularly regulatory authorities established under federal laws such as CAA? Before answering this question let us consider the management structure of CAA and to what extent it performs the functions of the Federal Government, as the matter of the performance of the Federal Government's functions was the reason which prevailed with the High Court to extend the Federal Government's *immunity* under Article 165(1) to CAA, and, consequently, CAA was held not liable to pay sales tax on services.

25. The management of CAA vests in its Board. The Board comprises of: the Vice Chief of Air Staff, the Secretary of the Planning and Development Division, the Secretary Culture, Sports, Tourism and Youth Affairs Division, the Managing Director of the Pakistan International Airlines Corporation, the Additional Secretary (Military Finance) Finance Division and the Director General of CAA. The Chairman of the Board is the Secretary of the Division of the Federal Government to which the affairs of CAA are allocated. The Federal Government also has the power to change the composition of the Board.

26. The Federal Government also exercises control over the financial affairs of CAA. CAA's budget is required to be approved by the Federal Government (section 15 of the CAA Ordinance). CAA has to maintain its accounts in the manner as prescribed by the Federal Government (section 17 of the CAA Ordinance). CAA's accounts are audited by the Auditor-General of Pakistan (section 18 of the CAA Ordinance), who is a constitutional office holder (Article 168 of the Constitution). CAA must submit yearly reports

to the Federal Government which the Federal Government is required to place before the National Assembly and the Public Accounts Committee, which "*shall scrutinize and examine the reports*" (sub-section (3) of section 21 of the CAA Ordinance). The Federal Government is also empowered to make rules for CAA (section 26 of the CAA Ordinance). CAA cannot wind itself up nor can it be wound-up by an order of a company judge unlike corporate entities, but can only be wound up by an order of the Federal Government and in such manner as the Federal Government directs (section 28 of the CAA Ordinance).

27. CAA has also not been set up as a commercial entity to turn a profit for its shareholders / owners / Federal Government. The CAA Ordinance does not stipulate that the Federal Government is to be paid profits made by CAA nor obliges CAA to hand over its profits to the Federal Government. In fact CAA is financially dependent on the Federal Government. It is the Federal Government which provides funds to CAA enabling it to undertake its functions. The "Civil Aviation Authority Fund" ("**the Fund**") is set up under section 16 of the CAA Ordinance and comprises of grants made by the Federal Government, loans obtained from the Federal Government, sale proceeds of bonds issued under the authority of the Federal Government, loans obtained by CAA with the special or general sanction of the Federal Government, foreign aid and loans obtained with the sanction of the Federal Government on such terms and conditions approved by the Federal Government and all other sums received and fees collected by CAA (sub-section (2) of section 16 of the CAA Ordinance).

28. Another important feature of CAA is that it has been empowered by the Federal Legislature to levy and collect air route navigation charges, embarkation charges, fees paid in respect of issuance and renewal of licenses and any examination, fees and charges in respect of commercial exploitation of CAA's properties and landing and housing charges (sub-section (3) of section 16 of the CAA Ordinance). The fees and charges levied by CAA are under the authority of the Federal Legislature. Therefore, the province's imposition of sales tax in effect constitutes taxing the fees and charges billed and recovered by CAA. This cannot be permissible because it would mean that the province is taxing the constitutional means employed by the Federal Legislature to execute its constitutional powers. In doing so the province is also interfering in Federal functions.

29. In M'Culloch v. Maryland (above) the State of Maryland had imposed a tax on the notes issued in the State of Maryland by the local branch of the National Bank. The US Supreme Court held that a State could not resort to this kind of taxation as it would be repugnant to the other constitutional powers of the Union of the United States:

"There is no express provision for the case, but the claim has been sustained on a principle which so entirely pervades the constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it without rendering it into shreds."
(column 2, page 606)

The US Supreme Court was cognizant that the power to tax includes the power to destroy, therefore, the States did not have the power to tax when it would impinge upon some act of the Union/Congress:

“We are relieved, as we ought to be, from clashing sovereignty; from interfering powers; from a repugnancy between a right in one government to pull down what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy what there is a right in another to preserve. We are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power. The attempt to use it on the means employed by the government of the Union, in pursuance of the constitution, is itself an abuse, because it is the usurpation of a power which the people of a single state cannot give.”
(column 2, page 607)

The US Supreme Court further held that as the right to tax an activity of the Union never existed in the States it cannot be said to have been surrendered by the Tenth Amendment:

“We find, then, on just theory, a total failure of this original right to tax the means employed by the government of the Union, for the execution of its powers. The right never existed, and the question whether it has been surrendered, cannot arise.

But, waiving this theory for the present, let us resume the inquiry, whether this power can be exercised by the respective states, consistently with a fair construction of the constitution.

That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied.”
(column 2, page 607)

The US Supreme Court elaborately spelt out what would happen if it was conceded that the States had power to tax subjects which were within the domain of the Union/Congress:

“If the states may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent-rights; they may

tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government. This was not intended by the American people. This did not design to make their government on the states." (column 1, page 608)

The argument that the power to tax was concurrent between the government of the US and of the States and therefore the governments of the States too could tax banks was also dispelled:

"But the two cases are not on the same reason. The people of all the states have created the general government, and have conferred upon it the general power of taxation. The people of all the states, and the states themselves, are represented in Congress, and, by their representatives, exercise this power. When they tax the chartered institutions of the states, they tax their constituents; and these taxes must be uniform. But, when a state taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control. It acts upon the measures of a government created by others as well as themselves, for the benefit of others in common with themselves. The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole-between the laws of a government which, when in opposition to those laws, is not supreme."

(column 2, page 608 - column 1, page 609)

The US Supreme Court concluded by stating that the States could not retard, impede, burden or in any manner control the subjects that Congress could legislate on:

"The result is a conviction that the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared.

We are unanimously of opinion that the law passed by the legislature of Maryland, imposing a tax on the Bank of the United States, is unconstitutional and void."

(column 1, page 609)

In the present case the province of Sindh has legislated in respect of subjects or matters related thereto which are within the domain of the Federal Legislature, which is exactly what the State of Maryland had done. Therefore, the reasoning in the aforesaid US Supreme Court case of M'Culloch v The State of Maryland is equally applicable to present case and when interpreting our Constitution.

30. Pakistan like the United States of America is a federal republic or a federation. The Constitution states that Pakistan is a "Federal Republic" (Article 1(1) of the Constitution) comprising of the provinces, the Islamabad Capital Territory, the Federally Administered Tribal Areas and such States and territories as are or may be included in it (Article 1(1) of the Constitution). This amalgamation of territories constitutes the "Federation" (Article 1(3) of the Constitution). The seventh recital to the preamble to the Constitution mentions the "Federation" which comprises of "units". What therefore constitutes a federation or a federal state needs to be understood as this would further help determine the respective powers of the Federal and provincial legislatures.

31. In A. D. Dicey's seminal work, "Introduction to the Study of the Law of the Constitution", the concept of a federal state is considered (third chapter titled 'Parliamentary Sovereignty and Federalism' at page 143):

"A federal State is a political contrivance intended to reconcile national unity and power with the maintenance of 'State rights'. The end aimed at fixes the essential character of federalism. For the method by which federalism attempts to reconcile the apparently inconsistent

claims of national sovereignty of a constitution under which the ordinary powers of sovereignty are elaborately divided between the common or national government and the separate States. The details of this division vary under every different federal constitution, but the general principle on which it should rest is obvious. Whatever concerns the nation as a whole should be placed under the control of the national government. All matters which are not primarily of common interest should remain in the hands of the several States...".

There is no doubt that the functions performed by CAA, to apply Dicey's terminology, concern "the nation as a whole". CAA also serves every province and other units of Pakistan.

32. In a federal republic or federation matters of common concern to all the units are attended to by the republic or federation. Airplanes fly over the airspace of Pakistan, land and take off from airports situated in different parts of the country and also come and go from other countries flying through their airspaces. Airplanes carry passengers and may also transport goods and they take off and land in airports throughout the country, including the territories of the provinces. Airplanes also utilize facilities situated in different airports throughout the country. Since sales tax is ultimately to be borne by the users/people, therefore, if every province imposes sales tax it would make flying complex and unnecessarily expensive. Another adverse consequence would be to undermine the connectivity of the country. Airports situated in remote areas and in commercially unviable areas are subsidized; if such airports and the facilities they provide are subjected to sales tax these may become too expensive to use and resultantly the people will suffer. And if sales tax is imposed CAA may avoid spending money on the proper

maintenance of existing airports and may also be dissuaded to invest in new airports which are not commercially viable. This would adversely affect travel, national cohesion, the interest of the Federation and of the provinces. It cannot be presumed that the people of this country had granted to every province the power to separately tax CAA, and give the provinces a windfall. Airports already provide many benefits to the provinces: including a large infusion of capital, employment opportunities, strengthening of local economy, et cetera.

33. If however the Constitution does indeed grant the provinces the power to impose sales tax on services provided by CAA then general theories of what constitutes a federation would become irrelevant. The main thrust of the appellants' argument is based on the amendment made to item 49 of the Federal Legislative List by the Eighteenth Amendment and the conscious decision to insert the five words (*except sales tax on services*) in item 49 and the doing away of the Concurrent Legislative List. The Eighteenth Amendment to the Constitution cannot be viewed in isolation. What was contemplated at the time of enacting the Eighteenth Amendment and what was envisaged thereby can be considered in order to resolve any ambiguity or issue.

34. The case of Pakistan Workers Federation, Balochistan v Government of Pakistan (2014 PLC 351) involved the post Eighteenth Amendment scenario and the constitutional power to legislate on the subject of *trade unions, industrial and labour disputes and labour welfare* (items 26, 27, 28, 30 and 31 of the Concurrent Legislative List). The Concurrent Legislative List was

omitted by the Eighteenth Amendment. The question arose whether the Federal Legislature could still make laws in respect of matters that were mentioned in the Concurrent Legislative List. A Divisional Bench of the Balochistan High Court appointed Mr. Raza Rabbani as amicus to assist the Court. Mr. Rabbani in addition to being a senior counsel was a senator and the Chairman of the Senate of Pakistan. The judgment in the case was authored by me as Chief Justice of the Balochistan High Court. It will be appropriate to reproduce the following extracts from the judgment to show what was sought to be achieved by the Eighteenth Amendment:

"6. Mr. Raza Rabbani brought a rare insight into the deliberations as he was the Chairman of the Parliamentary Committee on Constitutional Reforms (herein after referred to as "the Committee") whose report dated 31st March, 2010 resulted in the Constitution (Eighteenth Amendment) Act, 2010. The Committee comprised of 26 Members representing all political parties, including those political parties which did not have representation in Parliament." (paragraph 6, page 361)

"We were informed that the first meeting of the Committee took place on 25th June, 2009, when the Committee elected its Chairman, namely Mr. Raza Rabbani. Mr. Rabbani stated that all the decisions of the Committee were by consensus and only notes of reiteration were recorded by 'dissenters'. The Committee proposed 102 amendments to 97 Articles of the Constitution, primarily with a view to do away with the mischief of the Eighth and Seventeenth Amendments to the Constitution that had been enacted by dictators. Section 96 of the Constitution (Eighteen Amendment) Act, 2010 substituted Article 270-AA; the earlier Article 270-AA had been validated and substituted by the Constitution (Seventeenth Amendment) Act, 2003 and had been inserted by the Legal Framework Order (Chief Executive Order No.24 of 2002)." (paragraph 6, page 360)

"7. Mr. Raza Rabbani referred to clauses (6), (8) and (9) of Article 270-AA, which are reproduced hereunder:

“(6) Notwithstanding omission of the Concurrent Legislative List by the Constitution (Eighteenth Amendment) Act, 2010, all laws with respect to any of the matters enumerated in the said List (including Ordinances, Orders, rules, bye-laws, regulations and notifications and other legal instruments having the force of law) in force in Pakistan or any part thereof, or having extra-territorial operation, immediately before the commencement of the Constitution (Eighteenth Amendment) Act, 2010, shall continue to remain in force until altered, repealed or amended by the competent authority.”

“(8) On the omission of the Concurrent Legislative List, the process of devolution of the matters mentioned in the said List to the Provinces shall be completed by the thirtieth day of June, two thousand and eleven.”

“(9) For purposes of the devolution process under clause (8), the Federal Government shall constitute an Implementation Commission as it may deem fit within fifteen days of the commencement of the Constitution (Eighteenth Amendment) Act, 2010.”

“The Implementation Commission, referred to in Article 270-AA(9), held 68 meetings and devolved 17 ministries in three phases, as per notifications issued by the Federal Cabinet Establishment Division dated 2nd December, 2010 (First Phase), 5th April, 2011 (Second Phase) and 29th June, 2011 (Third Phase). The process of devolution was required to be completed by the 30th June, 2011, as stipulated in Article 270-AA (8), thus stood concluded one day before the last date.”

“Mr. Rabbani stated that, to the extent that Parliament can make laws for Islamabad Capital Territory there is no objection or challenge to the Industrial Relations Act, 2012. He submitted that Parliament can also legislate in respect of the subjects mentioned in the Federal Legislative List including Item 31 of Part I in respect of 'corporation' and matters related therewith.”

“He also referred to Items 4 and 13 of Part II of the Fourth Schedule respectively “Council of Common Interests” and “Inter-provincial matters and co-ordination”. Article 154 of the Constitution provides that, “the Council shall formulate and regulate the policies in relation to matters in Part II of the Federal Legislative List and shall exercise supervision and control over related institutions” and that the highlighted words are noteworthy. Part II of the Fourth Schedule includes ‘railways’ (Item 1), ‘mineral oil and natural gas’ (item 2), ‘development of industries’ (item 3), ‘electricity’ (item 4), ‘major ports’ (item 5) ‘all regulatory authorities established under a Federal Law’ (item 6).”

“In his opinion Parliament could legislate in respect of inter or trans-provincial bodies or institutions that covered any of the said items. Reference was then made to Article 38(a), which requires that the State shall ensure “equitable adjustment of rights between employers and employees” and that the definition of ‘State’ is to be read in the context, and could mean Federal Government/Parliament or a Provincial Government / Provincial Assembly (Article 7 of the Constitution); however, as “inter-provincial matters and coordination” fell within the domain of Parliament the ‘State’ means Parliament, which is competent to enact laws in respect whereof.”

(paragraph 7, pages 361-2)

35. Mr. Raza Rabbani’s submissions in the aforesaid case also help in understanding the background and the manner in which the Eighteenth Amendment to the Constitution was discussed, enacted and implemented and also what were the objectives that were sought to be achieved. Mr. Rabbani stated, and the Balochistan High Court agreed with him, that despite the removal of the Concurrent Legislative List from the Constitution the Federal Legislature may still legislate in respect of a subject that was mentioned in the Concurrent Legislative List provided it came within the purview of another subject on the Federal Legislative List or was *incidental or ancillary* thereto. The Balochistan High Court held that despite the omission of the Concurrent Legislative

List from the Constitution the Federal Legislature could still constitutionally legislate with regard to the subjects contained therein provided they applied to federally controlled institutions, inter-provincial matters or corporations (items 3, 13 and 31 respectively of Part II of the Federal Legislative List) or were “incidental or ancillary” thereto (item 18 of Part II of the Federal Legislative List). The present situation is similar to the one in the Pakistan Workers Federation case even though *sales tax on services* was not mentioned in the Concurrent Legislative List. The Balochistan High Court also considered the scope of Articles 142 and 143 and the respective power of the Federation and the provinces to enact legislation.

36. It would be appropriate to reproduce the following portions from the judgment of the Balochistan High Court in the Pakistan Workers Federation, where the case law had been surveyed (paragraph 16, pages 369-371), and as the same is equally applicable in the present case:

“16. In the case of United Provinces v. Atiq Begum (AIR 1941 FC 16) the legislative lists in the Government of India Act, 1935 were under consideration. The judges of the Federal Court who heard the case gave their opinions with regard to different aspects of the case. Chief Justice Maurice Gwyer observed:

I think however that none of the items in the lists to be read in a narrow or restricted sense and that each general word should be held to extend to all ancillary and subsidiary matters which can fairly and reasonably be said to be comprehended in it. I deprecate any attempt to enumerate in advance all the matters which are to be included under any of the more general descriptions; it will be sufficient and much wiser to determine each case

as and when it comes before the court. (page 25, column 2)

Justice Sulaiman wrote:

If there are two possible interpretations, it is the duty of a Court to accept that one which is more reasonable, more consistent with ordinary practice and less likely to produce impracticable results. (page 31)

Their Lordships of the Privy Council have repeatedly stressed the fact that we must look to the pith and substance of the Act in order to ascertain its true nature and character. As laid down in (1882) 7 AC 829, the true nature and character of the legislation in the particular instance under discussion must always be determined, in order to 'ascertain the class of subject to which, it really belongs'. In (1937) AC 355 at p.367; Lord Atkin laid down:

In other words, Dominion legislation, even though it deals with Dominion property, may yet be so framed as to invade rights within the province, or encroach upon the classes of subjects which are reserved to provincial competence. It is not necessary that it should be a colourable device, or a pretence. If on the true view of the legislation it is found that in reality in pith and substance the legislation invades civil rights within the province, or in respect of other classes of subjects otherwise encroaches upon the provincial field, the legislation will be invalid. (pages 35 and 36)

And from the judgment of Justice Varadachariar the following is helpful:

A point was made by the learned counsel for the respondents that S.100, Constitution Act used the expression "with respect to any of

the matters enumerated in the list" and not words like "relating to the matters enumerated in the list." It seems to me that the words "with respect" are not by any means less comprehensive than the words "relating to." ... The significance of these expressions may become important in a case where the impugned legislation contains a number of provisions relating to different matters and a question arises as to whether one set of provisions can be described as "passed in respect of a forbidden subject" or can be considered as only incidentally affecting such a subject while forming part of an Act which in the main deals with an authorised subject. (page 45)

The same bench of the Federal Court in the case of Subramanyan v. Muttuswami (AIR 1941 FC 47) observed that:

It must inevitably happen from time to time that legislation though purporting to deal with a subject in one list touches also upon a subject in another list, and the different provisions of the enactment may be so closely intertwined that blind adherence to a strictly verbal interpretation would result in a large number of statutes being declared invalid because the Legislature enacting them may appear to have legislated in a forbidden sphere. Hence the rule which has been evolved by the Judicial Committee whereby the impugned statute is examined to ascertain its 'pith and substance', or its 'true nature and character' for the purpose of determining whether it is legislation with respect to matters in this list or in that. (page 51, column 1)

In re: C.P. Motor Spirit Act (AIR 1939 FC 1) the Federal Court was called upon to determine whether the Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938 or any part thereof was ultra vires the provincial Legislature. Gwyer C.J. in his opinion (pages 4-5), stated, that:

I conceive that a broad and liberal spirit should inspire those whose 'duty' it is to interpret it; but I do not imply by this that they are free to stretch or pervert the language of the enactment in the interests of any legal or constitutional theory, or even for the purpose of, supplying omissions or of correcting supposed errors. A Federal Court will not strengthen, but only derogate from its position, if it seeks to do anything but declare the law; but it may rightly reflect that a Constitution of government is a living and organic thing, which of all instruments has the greatest claim to be construed *ut res magis valeat quam pereat*." [which means, 'That the thing may rather have effect than be destroyed']

Sulaiman J, concurred with the opinion of Gwyer C.J. and set out the principle which emerged from the precedents, as under:

In a Federal Constitution, Provincial Legislatures are independent within the spheres allowed to them and within the prescribed limits. They are coordinate Governments and possess full legislative power and capacity to pass laws, so far as the matters assigned to the Provinces are concerned. The Provinces are entrusted with the exclusive authority in certain specified matters, not of an all-India concern, but of Provincial interest. (page 27)"

37. The Constitution, which is characterized as a living and organic thing, is not to be interpreted narrowly or restrictively, and a pedantic interpretive approach is to be avoided. Whilst the provincial legislatures are independent, they must operate within the sphere allotted to them and within their prescribed limit. Neither the Federation nor the provinces should invade upon the rights of the other nor encroach on the other's legislative domain. The pith and substance of the legislated subject is to be examined to determine in whose legislative sphere a particular subject comes

under. And above all a reasonable interpretation which does not produce impracticable results should be adopted.

38. The precursor of the Eighteenth Amendment was the report of the 'Parliamentary Committee on Constitutional Reforms'. This committee comprised of 26 members representing all the parliamentary parties and produced a unanimous report. The report mentions that amongst the objectives behind the Eighteenth Amendment was to, "*further strengthen the concept of federalism... along with provincial autonomy*" (clause 20 of the report dated March 31, 2010) and "*to further strengthen the Federation*", and "*strengthening of Institutions*" (item 9 in clause 18, clause 20 and clause 21 of the said report). However, with the imposition of sales tax on CAA the stated objectives are undermined, that is, neither the Federation nor the institution of CAA is strengthened.

39. The more one analyses the constitutional competence of a province to impose sales tax on CAA the more untenable it becomes. No sales tax was imposed on CAA before the enactment of the Act and the Rules. The appellants state that even before the insertion of these five words (*except sales tax on services*) in item 49 the provinces had the exclusive constitutional power to levy sales tax on services. The furthest that this argument takes us is that the provinces can impose sales tax on services. But this is still quite a distance from the provinces imposing sales tax on a Federal regulatory body.

40. CAA is a regulatory authority in terms of item 6 of Part II of the Federal Legislative List – "*All regulatory authorities established*

under a Federal Law". It regulates and controls civil aviation activities in the country (sub-section (1) of section 5 of the CAA Ordinance). CAA is a regulatory authority which performs functions that are within the exclusive domain of the Federal Legislature. The Federation exercises executive authority in respect of subjects which can be legislated by the Federal Legislature (Article 97(1) of the Constitution) and the Federal Government's executive authority can be conferred on "authorities subordinate to the Federal Government" (Article 98(1) of the Constitution). The Federal Legislature enacted the CAA Ordinance. CAA is controlled by a Board which is appointed by the Federal Government and CAA is bound by the directives of the Federal Government. Moreover, CAA operates under the oversight of the peoples' representatives and as such accountable to them. It is financially monitored by a constitutional office holder. In taxing CAA the province of Sindh taxes the operations of the Federal Government and a regulatory authority created by the Federal Legislature. A province cannot act upon such institutions because they are created by the representatives of the entire Federation, that is of all the units of the Federation and the people residing therein. The people of a particular unit of the Federation, in this case the people of Sindh, cannot prevail over the will of the whole over whom they can neither claim nor exercise control. Chief Justice John Marshall's epigrammatic statement, that the power to tax involves the power to destroy which renders useless the power to create, as the power to tax may be extended to take up one hundred per cent of the earnings, applied to the present case means a province or provinces by taxing CAA could wipe

out its undertaking and render useless the Federal Legislature's power to create. The power which the Federal Legislature had exercised in creating CAA.

41. Having already determined that the province did not have the power to impose sales tax on CAA the second question, whether CAA provides taxable services, no longer needs to be answered. We may however point out the obvious. The provision of services alone may not be sufficient to attract taxation thereon. It is intrinsic in the phrase *sales tax on services* that the services must be sold. The provision of free services are not taxable because it renders the word *sales* in the phrase redundant. Charitable organizations which do not charge for feeding the poor, caring for the sick or for burying the dead, still provide valuable *services*. However, these services are not sold therefore the revenue cannot impose sales tax. The *sale* of services also implies that they are voluntarily provided. A convict's labour, to meet the *rigorous imprisonment* term of his sentence, may constitute *services* but as these are provided under compulsion therefore they cannot be taxed. The CAA too does not have the freedom whether to provide or not to provide *services* as the CAA Ordinance mandates CAA to perform its legislative functions, which include the provision of such *services*.

42. We have examined the nature of our Constitution and the distribution of the legislative powers between the Federal and the provincial legislatures. The significance of powers vesting in the Federal Legislature, and the manner in which the Federal Legislative List and the *incidental or ancillary* matters clause therein, and the Constitution was interpreted. The background of

the Eighteenth Amendment and what was sought to be achieved thereby, considered the significance of the five words which were added to item 49 of the Federal Legislative List and whether they simply affirmed the pre-Eighteenth Amendment position or provided a new taxing power to the provinces. We have also examined the scope of the CAA Ordinance, the establishment of CAA, its functions and regulatory role. The Sindh statutes which attempted to tax CAA were scrutinized. The question whether CAA provides *services* and, if it does, can these be taxed was also examined. After scrutinizing all these different matters and from different perspectives we come to the same conclusion; a province cannot impose sales tax on CAA. Therefore, the question whether CAA can benefit from the "exemption" under Article 165(1) of the Constitution becomes irrelevant.

43. We therefore hold and declare:

- a. CAA performs functions mentioned in the Federal Legislative List and is also a federal regulatory authority envisaged in item 6 of Part I of the Federal Legislative List.
- b. The functions and regulatory duties performed by CAA are within the exclusive sphere of the Federal Legislature and the appellants cannot *impose sales tax* on the purported *services* provided by CAA.
- c. Matters of common concern to the federating units of Pakistan are attended to by the Federal Legislature and the Federal Government has the power to exercise executive authority in respect of all such matters itself

or through an authority (like CAA) in terms of Articles 97 and 98 of the Constitution.

- d. Amongst the objectives of the Eighteenth Amendment was to further strengthen the Federation and institutions therefore it cannot be interpreted to weaken the Federation and institutions like CAA.
- e. The Sindh Sales Tax on Services Act (Sindh Act No.XII of 2011) and the Sindh Sales Tax on Services Rules, 2011 to the extent that they impose on CAA *sales tax on services* are contrary to the provisions of the Constitution, are void *ab initio* and of no legal effect.
- f. The Sindh Sales Tax on Services Act and the Sindh Sales Tax on Services Rules, 2011 to the extent that they tax CAA violate Article 142(a) since only the Federal Legislature can make laws with respect to matters pertaining to CAA.

44. The impugned judgment of the High Court is upheld to the extent that it had determined that, CAA "*...is not liable to pay the tax under the Sindh Sales Tax on Services Act, 2011. All demands made, proceedings initiated, orders passed or notices issued to the petitioner [CAA] under or in terms thereof are hereby quashed and set aside*", but we do so for the reasons given in the aforesaid paragraph 43. Consequently, this appeal is dismissed. Since this case required the examination and scope of provincial laws and determining their constitutionality, which had not previously been done by this Court, there shall be no order as to costs.

45. Before parting with this judgment we would like to thank all the learned counsel for their able assistance and conducting themselves in a manner that does their profession proud.

Judge

Judge

Judge

Bench-V
Islamabad
May 29, 2017
(Farrukh)

Announced in open Court at Islamabad on May 29, 2017.

Judge

Approved for Reporting